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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 818

UNITED STATES LINES COMPANY and
SS AMERICAN HARVESTER,

Petitioner,

against

EMANUEL VAN CARPALS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported in 297 Fed. (2d) 9.

The opinion of the Court below denying a re-hearing has not yet been reported, but appears in the Appendix to Petition, pages A-18 and A-20.

The opinion of the United States District Court for the Southern District of New York has not been reported but appears in the Appendix to Petition, pages A-5 to A-8.

Questions Presented

Before we consider the questions presented we wish to correct some misleading statements in the Petition for Certiorari.

Mention is made (p. 2) of the use of the words "and it erupted" in the Court of Appeals' decision, to describe the action of the steam and hot water which issued from the valve and scalded Van Carpals.

The witness used this language with reference to the occurrence:

> "The steam blowed out right in my face, my hands and everything."
>
> Testimony of Van Carpals,
> Libelant-Appellant's Appendix, page 9A (1).

If "blowed out" does not authorize the use of "erupted" then our language is not as elastic as it should be.

Webster's New World Dictionary defines "blow" as "to burst or break by an explosion", and the same authority defines "erupt" as "to cause to burst forth; throw forth; eject".

So when Van Carpals said that the steam "blowed out" he was also saying that it erupted. Even the original word "exploded" was justified.

This criticism of the opinion is mere quibbling.

The Petition presents a false and misleading picture of the relationship of Van Carpals to the work in which he was engaged.

The petitioner, in several places in its "Reasons for Granting the Writ", makes statements like,

> "The holding that a warranty of seaworthiness exists in favor of a shore-based worker engaged in testing the ship for the bi-annual inspection. . . ."
>
> Petition, page 22, Point III.

And again:

> "How, under these circumstances, can it be validly held that a shipowner warrants the seaworthiness of a vessel to those shore-workers who are *hired for the very purpose of testing the vessel for seaworthiness?*" (Italics supplied.)

And again:

> "How can such a person have or rely on such warranty when *his sole duty is to ascertain the very existence of seaworthiness?*" (Italics supplied.)
>
> Petition, page 25.

The fact and the truth was that the actual inspection was to be made by the Coast Guard and not by Van Carpals, a shore mechanic employed by Todd Shipyards.

The job which Van Carpals was to perform was simply to remove the outer coverings from the valve assembly and to expose the valve itself for inspection not by him but by the Coast Guard.

The engineer, Boyle, testified:

> "Q. And what were your duties aboard the ship on that day? A. My duties had been slated out to me the night before, to prepare the engine room for the United States Coast Guard inspection, an A.B.S. examination."
>
> Testimony of Boyle,
> Libelant-Appellant's Appendix, page 13A.

> "Q. What job were you ordered to do on that vessel? A. We were ordered to overhaul the boiler valves, open them up for inspection of the U. S. Coast Guard."
>
> Testimony of Christiansen,
> Libelant-Appellant's Appendix, page 9A (2).

In the Petition on page 8 is this quotation from Christiansen,

> "A. We supposed to take the boiler valves off for a check by the Coast Guard."

So that there is no excuse for this petitioner to attempt to mislead this court into believing that Van Carpals was to do the inspecting when it knew that that job was exclusively for the Coast Guard.

Another grossly misleading and baseless statement is as follows:

> "Clearly, the very work contemplated the presence of steam in the appurtenance. As the libelant himself testified, part of the work was 'testing if steam comes out, or anything like that, water comes out.'"
>
> Petition, page 18, bottom.

That quotation was taken completely out of context. The whole sentence would have yielded a totally different picture.

This was the situation:

It was essential for Van Carpals' safety that the pipes and valve be drained and freed of pressure, steam or hot water. To accomplish this the lines presumably had been opened and drained. The gauge showed no pressure. Before Van Carpals started to work he had been assured by the Port Engineer and the ship's First Assistant Engineer that there was neither pressure nor steam in the lines.

It is not true that Van Carpals' work "contemplated the presence of steam in the appurtenance". The very opposite was true for the contemplated work was to be on valves, pipes and tubes which had been previously freed of pressure, steam and hot water.

And the ship's engineer endeavored to accomplish just that—to obtain a pressure-free, steam-free and hot water-free valves, lines and their component parts.

The version stated by the petitioner is inexcusably false and misleading.

When Van Carpals said that part of the work was "testing if steam comes out", he was referring to his personal precaution to detect the possible presence of steam before he proceeded to remove the bonnet. That was his customary method when doing that kind of job.

The full quotation from his testimony is as follows:

> "We were supposed to take the boiler valves off for a check by the Coast Guard. So we usually start loosening them and then testing if steam comes out, or anything like that, water comes out."

Testimony of Van Carpals,
Libelant-Appellant's Appendix, page 7A

Thus, we see that Van Carpals was simply trying for his personal satisfaction to determine whether there was any pressure in the assembly or "if steam comes out." This was his routine test, his habit. He was not making a general test for that was the job of the Coast Guard. He, as an individual, was merely taking an extra precaution to re-assure himself that it was safe to proceed in unseating that particular valve. His work was not of a nature which "contemplated the presence of steam in the appurtenance", as the Petition states. He had no occasion, with the safety assurances of the engineers in his mind, to "*contemplate*" the presence of steam under pressure. He did not expect to encounter the expulsion of the steam. The steam had no business being there and Van Carpals was naturally surprised when it burst forth upon him.

It is, therefore, clearly apparent that the petitioner was stretching the truth when it tried to create the impression that at the time Van Carpals was injured, he was engaged in making a general test for the presence of "contemplated" steam.

I.

The decision of the District Court was clearly erroneous for the evidence established physical facts which constituted unseaworthiness.

What happened?

In the forenoon, despite the statement of the ship's engineer that there was no pressure and no steam in the line, nevertheless, out of an abundance of caution, Van Carpals and his foreman tested for pressure and found that hot water came out! This finding they reported to the engineer, and they then went to lunch.

After lunch they were positively assured that there was neither pressure nor steam in the line and that it was safe to proceed to expose the valve.

While so engaged there was a "burst-out" of steam and hot water, and Van Carpals was badly scalded.

There was the undisputed physical fact of the eruption of steam from lines which had been represented as entirely freed of pressure and steam, as the engineer had advised.

True, no witness could pin-point the particular defect or insufficiency which caused the steam to erupt but the fact of the happening was not disputed. There was pressure and steam where they should not have been. Manifestly, there was a mechanical defect which captured and held a quantity of steam under pressure and which defect prevented the steam and hot water from flowing out when drainage was established. Even the gauge erroneously showed zero.

An assembly in good seaworthy condition would have yielded to the usual drainage procedure and not retain steam under pressure. If the mechanism had been in proper working order, the accident would not have happened. Manifestly, it was not in a seaworthy condition.

The vessel's equipment was not fit (steam free) for the intended use (unseating the valve) for Coast Guard inspection. Nor was the vessel fit to sail the seas with that pocket or defect in the line, which condition may have caused serious trouble while at sea. The condition, whatever it was, constituted unseaworthiness.

The only reasonable inference to be drawn from such undisputed fact is that someting was not in proper working order. This of itself was sufficient to invoke the inference of defective mal-functioning and, consequently, unseaworthiness.

> *Sprague* v. *The Texas Company*, 250 Fed. (2d) 123.

When the trial judge closed his eyes to these physical facts and ignored the manifest inference which any fair-minded person would have drawn therefrom, his finding of no unseaworthiness was not only clearly erroneous but cannot be justified, as is attempted by petitioner, upon the specious claim that there was no proof of negligence. When unseaworthiness enters, negligence goes out.

Since the physical fact of the eruption of steam was neither explained nor disputed, the fact may be considered as "conceded".

When a judge ignores the undisputed physical fact that, despite assurance that the lines and valves were free from pressure and steam, there was both pressure and steam locked within the very assembly which had presumably been drained and pressure-freed, he thereby made a finding so contrary to fact and law as to be clearly erroneous.

> "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
>
> *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, at page 395.

II.

Since shore workers who do the work usually and traditionally performed by seamen-members of the crew, they enjoy the same protection as to seaworthy places, appliances and machinery as crewmen.

The work of removing some bolts and lifting a valve from its cradle does not require any mechanical skill which could not be done by any of the ship's engineers. So that this shore worker was doing work which usually fell to the engineers or other mechanics in the crew. Van Carpals was merely a shore workman, relying on muscle power to do the job which could, and, absent the "spread the work" concept, would have been done by the ship's engineer.

So that Van Carpals was, to all intents and purposes, in the category of a seaman and, as such, was entitled to a seaworthy place to work and seaworthy machinery upon which to work when his personal safety depended on the machinery being in a seaworthy condition. His job was not to repair defective machinery.

Even if the legal requirement was for a vessel which was "reasonably fit" for the intended work, it is clear that the assembly upon which Van Carpals was to work was absolutely unfit, unsafe and dangerous.

However, we see no occasion to resurrect the issues of "absolutely safe" or "fit for the intended use" which were most carefully considered in *Mitchell* v. *Trawler Racer*, 362 U. S. 539. The facts in this case leave no room for a re-discussion of those liabilities. The condition which existed constituted an unseaworthy conditon.

Petitioner asks grant of the writ in order to settle an alleged conflict not only intra-circuit but between other circuits.

Any intra-circuit conflict on the question of "reaosnable fitness for the intended use" or of "negligence" has no relevancy to this case because Van Carpals rested his right to recover upon unseaworthiness and not upon negligence.

And, similarly, any conflict between the Second and Ninth Circuits on the question whether negligence is subject to the clearly erroneous test, on appeal, is foreign to any issue in this Van Carpals case.

The trial judge entirely disregarded the unseaworthiness present in the proofs, for he said:

> "This appears to be the type of unexplained accident for which liability cannot be predicated upon negligence."
>
> Petition, Appendix, page 7A (54).

The libelant expressly relied upon unseaworthiness for his proctor, at the close of the trial, addressed the court and said:

> "As I view the legal aspect, the rule applicable would be an obligation on the part of this ship to furnish an absolutely seaworthy place for the man to work."

III.

The holding that Van Carpals, a shore worker, was entitled to a seaworthy place of work, was correct.

We emphasize again that Van Carpals was not himself engaged in testing the machinery in order to make the required inspections. That duty devolved by law solely upon the Coast Guard.

The Coast Guard wanted to inspect that valve and its component parts. Van Carpals was to remove the bonnet and unseat the valve so that it could be easily viewed and inspected by the Coast Guard. Van Carpals had no official

standing. He had no authority to pass upon the condition of the valve. The Coast Guard inspectors were there for that purpose. Van Carpals had no more to do with the official inspection than a nurse who exposes the operation site has to do with the eventual surgery.

We see no reason to attempt any reconciliation of the *West* and *Filipek* cases, or in applying them to the Van Carpals case.

The *West* case involved a vessel which had been withdrawn from maritime service. She was undergoing a complete overhauling. It was a dead ship. The workers upon her were not in the category of seamen.

West v. *United States*, 361 U. S. 118.

The *Filipek* case carries its own distinguishing facts—for, flying the Canadian flag, she operated under Canadian law, and under that law the testing had to be done by a non-crewman—by an outside expert not connected with the ship.

Filipek v. *Moore-McCormack*, 258 Fed. (2d) 734; Cert. denied.

Van Carpals was working on a vessel in navigation, but at dock for a mandatory inspection. She went from her berth to the Todd Shipyards under her own power and with her personnel aboard. She was not out of maritime service while temporarily having her machinery inspected. This vessel was not a dead ship, nor was she one which had for any reason been taken out of service, and without her crew aboard. She was a live, navigable vessel and engaged in navigation just as if moored to her pier to load or discharge cargo.

It is untrue, as claimed by petitioner on page 24 of the Petition, that the status of Van Carpals was similar to that of Filipek in that his work was "neither routine nor one of ordinary maintenance".

Periodical inspection by the Coast Guard was routine procedure and Van Carpals was doing work of "ordinary maintenance" in helping the Coast Guard make the inspection. When the statute requires an inspection that inspection becomes routine.

The petitioner asks:

> "How can such a person (Van Carpals) have or rely on such a warranty (of seaworthiness) when his sole duty is to ascertain the existence of seaworthiness?"
>
> Petition, page 25, bottom.

How can responsible counsel be guilty of such a distortion of fact?

Van Carpals had no duty to ascertain the existence of seaworthiness—that was the duty of the Coast Guard. Van Carpals' sole duty was to expose the parts for the Coast Guard. Van Carpals was to do no testing. His work was perfunctory—simply remove the valve so that it could be conveniently inspected by the only duly authorized inspector. Van Carpals was not an official inspector to determine the safety of the ship's machinery.

Salient Facts

In order to emphasize the utter lack of merit in the contentions of petitioner, we invite the court's attention to two bits of vital testimony.

The First Assistant Engineer Boyle testified:

> "Q. Did you look at the gauge that morning after the hydrostatic test had been performed? A. Yes, I glanced at it.
>
> Q. And did it read zero? A. Yes, they both read zero.

Q. I see. And that indicates there is no pressure there, is that right? A. That would indicate apparently there is no pressure there.

Q. Well, the way it turned out, the word 'apparent' would be a proper word? A. Yes."

Testimony of Boyle,
Libelant-Appellant's Appendix, page 16A.

In addition to the legal presumption that the machinery was seaworthy, there was an express representation and assurance of safety by the Port Engineer Snow and the First Assistant Engineer Boyle given to Christiansen, who was Van Carpal's foreman:

"Q. Did you come back after eating? A. Yes, 12:30.

Q. Did you have another conversation with the first assistant? A. I did, and Mr. Snow, both.

Q. Well, what transpired then with reference to the job? A. Well, then we were told to open it up. Everything was all right.

Q. Who said that to you? A. Mr. Snow and the first engineer.

Q. He said everything was all right? A. All right. 'They can find no pressure on the line'.

Q. Then what did you and Van Carpals proceed to do? A. We disconnected that valve."

Testimony of Christiansen,
Libelant-Appellant's Appendix, page 10A.

"Q. After that was the okay given to Mr. Christianson to go ahead and work? A. Yes. I believe Mr. Snow said it's all right to work."

Testimony of Boyle,
Libelant-Appellant's Appendix, page 17A.

So that, irrespective of considerations of reasonable fitness or unseaworthiness, Van Carpals had an express assurance that everything was safe for him to do the work. It was a virtual warranty.

Conclusion

The District Judge, in ignoring the undisputed physical facts, made a decision which was clearly erroneous.

Van Carpals was a shore worker doing the work usually performed by seamen and stood in a seaman's shoes, so far as the law is concerned.

The vessel was in navigation although temporarily undergoing a mandatory inspection.

Furthermore, the deliberate misstatements of the testimony by petitioner were intended to create the erroneous impressions that

1. Van Carpals' work was to inspect the machinery in the capacity of an inspector rather than in his true role of shore worker to prepare the valve for Coast Guard inspection.

2. Van Carpals made a test for steam and hot water because "the very work contemplated the presence of steam in the appurtenance" (Petition, p. 18, bottom), instead of the truth which was that his only test was, just before loosening the bonnet, he out of habit looked for water, which act was but an isolated personal safety precaution notwithstanding the prior assurances of the engineers.

Such distortions of the testimony were obviously designed to mislead this court in respect of the true relationship of Van Carpals to the official Coast Guard inspection, and to put Van Carpals in a false light.

Such tactics should indicate a denial of the writ.

There is no merit in any ground relied upon to justify the grant of the writ.

Respectfully submitted,

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